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Supreme Court of the United States

OCTOBER TERM, 1963

No. 720

In the Matter of the Petition of

EASTERN AIR LINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD.

PETITION OF EASTERN AIR LINES, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

CIVIL AERONAUTICS BOARD.

PETITION OF EASTERN AIR LINES, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Eastern Air Lines, Inc. ("Eastern") prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the First Circuit, entered on October 17, 1963 and November 6, 1963, which orders, respectively, granted Northeast Airlines, Inc. ("Northeast") a stay of Civil Aeronautics Board Order E-19910 (August 15, 1963) to a date certain rather than *pendente lite* and denied Eastern's motion for leave to intervene in the case before that Court.

Opinions Below

Copies of the orders of the Court below, rendered without opinion, are attached as Appendix A hereto.

Jurisdiction to Review

The dates of the orders of the Court of Appeals sought to be reviewed are October 17, 1963 and November 6, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1958).

The following decisions sustain the power and jurisdiction of this Court to review the order complained of herein upon petition of an intervenor or would-be intervenor: *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 20 (1951); *International Union of Mine Workers* v. *Eagle-Pitcher Mining & Smelting Co.*, 325 U. S. 335, 338-39 (1945); *Consolidated Edison Co.* v. *International Bhd. of Elec. Workers*, 305 U. S. 197 (1938).

Questions Presented

(1) Whether an air carrier party, which participates as a formal party and bears a major burden in developing the evidentiary record in a Civil Aeronautics Board route proceeding, and which has a direct and substantial financial interest in upholding the orders of the Board, is entitled to intervene and support those orders upon review thereof by a court of appeals.

(2) Whether a reviewing court has the power to grant a stay to a date certain, rather than *pendente lite* alone, of the effectiveness of an administrative order denying renewal of a temporary certificate of public convenience and necessity.

(3) Whether a court, in reviewing the decision of an administrative agency, can substitute its judgment for that of the agency and grant a stay of the agency's order without giving reasons for its action and while denying the intervention of interested and affected persons with respect to its action on the stay.

Statutes Involved

Administrative Procedure Act §10(d), 5 U. S. C. §1009(d) (1958).

Federal Aviation Act §1006(d), 49 U. S. C. §1486(d) (1958).

The relevant sections of these statutes are set forth in Appendix B.

Statement

In 1956, the Civil Aeronautics Board ("Board" or "CAB"), in the *New York-Florida Case*, 24 C.A.B. 94 (1956), authorized Northeast to operate south of New York to Miami via intermediate points for a temporary period of five years. That authority expired on November 27, 1961. Northeast continued to operate south of New York until October 14, 1963, however, because of the provisions of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. §1008(b) (1958), and has operated south of New York since October 17, 1963 by reason of the stay purportedly granted by the Court below.

A proceeding, styled the *New York-Florida Renewal Case*, CAB Docket 12285 *et al.*, was commenced in June 1961 to determine whether the public convenience and necessity required renewal of Northeast's authority south of New York. The proceeding lasted more than two years and the issues were briefed and argued after compilation of a voluminous record of some 11,000 pages. On August 15, 1963, the Board issued its Decision and Order E-19910, in which it determined, upon the evidentiary record and findings of fact, that the public convenience and necessity do not require the operation of a third carrier in markets previously temporarily certificated to Northeast south of

New York and also served by Eastern and National Airlines, Inc. ("National") under the authority of permanent certificates of public convenience and necessity. Pursuant to the Board's Rules of Practice, petitions for reconsideration were filed by a number of parties. Some parties, including Northeast, in contemplation of the denial of the petitions for reconsideration and of subsequent judicial review, also sought from the Board a stay of the effective date of its decision pending judicial review. On October 8, 1963, the Board issued its order (Order E-20073) on reconsideration denying the petitions for reconsideration and motions for stay but, by attempting to postpone the effective date of its order from October 14 to November 15, 1963, purported to allow Northeast 32 additional days in which to terminate operations south of New York.

In the interim, Northeast had filed on October 4, 1963 its petition seeking judicial review by the Court of Appeals for the First Circuit of the Board's Order E-19910 and, on October 7, 1963, a motion with the Court seeking a stay of said order until April 30, 1964. Eastern, petitioner herein, filed on October 7, 1963, a motion for leave to intervene in the proceedings in the First Circuit, and on October 8, 1963, a motion for leave to intervene with respect to and to be heard upon Northeast's motion for stay. On October 17, 1963, the Court below denied Eastern's petition for leave to intervene and its motion for leave to file a memorandum in opposition to stay but granted Northeast's motion for stay, not *pendente lite* alone but until April 30, 1963, without specifying any grounds for its decision other than a consideration of the documents before the Court. See Appendix A. By that action, Northeast was given greater operating rights than it has held since November 26, 1961, when its certificate expired and it continued operations pursuant

to Section 9(b) of the Administrative Procedure Act, 5 U. S. C. §1008(b) (1958), since the Court's action has, if the Court had jurisdiction so to do, effectively certificated Northeast for a term certain—to April 30, 1964—whereas before it held authority to operate south of New York only pending final determination of its application.

On October 25, 1963, Eastern asked the Court below to reconsider its denial of Eastern's motion for leave to intervene in the review proceeding and on November 6, 1963, the Court denied such reconsideration, allowing Eastern to file an *amicus curiae* brief only. The respondent Board certified the record to the Court in accordance with its rules, and the clerk of the Court notified the parties that the case would be heard at the January term. See Notice From Clerk, United States Court of Appeals for the First Circuit, October 22, 1963. Under the Court's rules, Northeast's brief would have been due November 26, 1963. Prior to the due date, Northeast asked for an extension of time for filing briefs to January 31, 1964. Eastern was not served with Northeast's paper and, on November 18, 1963, the Court granted Northeast's motion without Eastern's having been heard upon the matter of the delay. Decision in the case may be delayed for at least two months and the consequent loss of revenue by Eastern, for two months, would be over $2 million.

Reasons for Granting the Writ

1.

The decision of the Court below represents a marked departure from settled law governing the rights of parties to administrative proceedings, substantially affected by orders entered therein, to intervene and support such orders upon appeals of agency determinations by aggrieved parties.

It is well established that "Rule 24, F.R.C.P., now embodies the primary prescription for intervention in federal actions." *Kozak* v. *Wells*, 278 F.2d 104, 108 (8th Cir. (1960)). See *Algonquin Gas Transmission Co.* v. *FPC*, 201 F.2d 334, 342 (1st Cir. 1953). Under that rule, a movant "*shall* be permitted to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is *or may be* inadequate and the applicant is or may be bound by a judgment in the action. . . ." (Emphasis added.) Fed. R. Civ. P. 24.

It should be noted at the outset that the Rule requires only that the party seeking intervention *may* be inadequately represented. In the instant case, that possibility exists. The CAB may not, except upon the request of the Department of Justice, appear in court in defense of its orders. See Federal Aviation Act §1008, 49 U. S. C. §1488 (1958). Thus, although CAB attorneys are presently appearing in the Court below, they do so at the sufferance of the Department of Justice, and should the Department decide to abandon the cause, CAB would, by the language of the Act, be unable to take further steps. That such action is within the realm of the possible is shown by the Justice Department's pleadings, filed with the Board, attacking the Board's decision. See Petition of the United States For Reconsideration and Reargument and For a Stay of the Decision and Order E-19910, CAB Docket 12285 *et al.*

The impact of such an attitude upon a prospective intervenor's rights was recognized by the Court of Appeals for the District of Columbia Circuit in *Textile Workers Union* v. *Allendale Co.*, 226 F.2d 765 (D. C. Cir. 1955), *cert. denied sub nom. Allendale Co.* v. *Mitchell*, 351 U. S. 909 (1956), which stated at 768:

> "The right of the appellants to intervene is not affected by the fact that the general position they

> assert is already represented in the action by the Secretary of Labor. The Secretary's response to the motions to intervene declares that neither the appellants nor the appellees can show themselves to be directly affected by the determinations. This is hardly an assurance of adequate representation for the appellants. Even if the Secretary espoused the appellants' interests with greater heart, it would not necessarily preclude their appearance to plead for themselves." (Footnotes omitted.)

See also *Kaufman* v. *Societe Internationale*, 343 U. S. 156, 160-62 (1952).

The *Textile Workers* case concerned an attempt by competing employers and affected labor unions to intervene before a District Court which was reviewing certain determinations by the Secretary of Labor fixing the prevailing minimum wages in the woolen and worsted industry where Government contracts were concerned. After denial of their petitions for leave to intervene, the appellants sought review of that action in the Court of Appeals, asserting that they were entitled to intervene and support the Secretary's determination. The Court of Appeals held that they were so entitled as a matter of right, under Rule 24. The *Textile Workers* case is indistinguishable in any important particular from the case at bar.

To the same effect, see *Atlantic Ref. Co.* v. *Standard Oil Co.*, 304 F.2d 387 (D. C. Cir. 1962), wherein Standard Oil sought to have a regulation issued by the Secretary of the Interior declared illegal. Appellants, an association of small refiners, sought to intervene in the District Court and support the Secretary's regulation. Upon denial of their motion, appeal was taken to the Court of Appeals. In holding that the association was entitled to intervene as a matter of right, the Court stated at 392:

> "In order to establish that representation of the interest of the applicant for intervention by existing parties is or may be inadequate, it is not necessary to show that such parties or their counsel are not acting in good faith, or are not properly discharging their duties, either in prosecuting or defending the action . . . ."

In essence, these cases seem to stand for the proposition that a person with sufficient interest in a judicial proceeding to be substantially affected by a determination therein, is entitled to representation *of his choice* before it can be said that he is adequately represented. However, even if the cases be construed less broadly, Eastern respectfully submits that these precedents, together with the Justice Department's publicly announced attitude toward the Board's order, conclusively establish the fact that Eastern, at the least, "may be" inadequately represented by the existing parties.

Rule 24 further requires that the prospective intervener "is or may be bound by a judgment in the action." Fed. R. Civ. P. 24. There can be no doubt that Eastern is and will be "bound" by any judgment rendered by the Court of Appeals for the First Circuit in the instant case. Eastern has a right, under Section 1007 of the Federal Aviation Act, 49 U. S. C. §1487 (1958), to obtain enforcement of the Board's order in any competent district court of the United States. However, if found to be valid, the order of the Court below, purporting to stay the effect of the Board's Order, would constitute an absolute defense to such action at this time.

An almost identical situation is found in *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D. C. Cir.), *cert. denied*, 323 U. S. 777 (1944), where appellee had brought suit in the District Court to enjoin members of the Zoning Commission of the

District of Columbia from carrying into effect a disputed zoning order. The District Court granted the requested injunction. Subsequently, after the lower court's decree was entered, the Commission voted not to take an appeal. Thereafter, almost a month after such decision by the Commission, a number of adjoining landowners filed motions for leave to intervene. Upon denial of their motions, appeal was taken to the Court of Appeals for the District of Columbia Circuit. In holding that appellants fully satisfied the requirements of Rule 24(a) and were thus entitled to intervene as a matter of right, the Court stated at 507:

> "It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the extent of taking away their statutory right to an independent action based on the order."

Thus, Eastern is presently bound by a judgment entered in the Court below, in that its right to a statutory action based on the Board's order would be stayed by the Court's stay order. And if the Board's order is declared void by the First Circuit, Eastern's right to such an action would be permanently taken away.

Furthermore, the courts have recognized that the strict test of *res judicata* is inappropriate in applying Rule 24(a) to appellate cases growing out of administrative proceedings. See *Textile Workers Union* v. *Allendale Co.*, *supra* at 767 where the Court stated:

> "Appellants in this case were not parties in a technical sense to the administrative proceeding; nevertheless they are 'bound' by the determinations therein in a very practical sense. Authoritative rulings made in this proceeding fixed a wage at a national level. *These rulings are under attack in the suit for review* below. It is true that, if the attack succeeds, the final judgment would preclude neither the appellants nor the appellees from later pressing their interests at the administrative level. But ultimate victory at that

point cannot overcome the *'practical disadvantage'* to which appellants may be subjected as a result of the prior judicial action." (Emphasis added.) (Footnote omitted.)

See also Note, *Intervention and the Meaning of "Bound" Under Federal Rule 24(a)(2)*, 63 YALE L. J. 408 (1954).

In the instant case, Eastern was not only a full party to the proceeding before the agency, but Eastern has indisputedly already been subjected to a "practical disadvantage" by the actions of the Court of Appeals for the First Circuit. As shown in the record below Eastern is losing, and will continue to lose, almost $50,000 per day in passenger revenue alone so long as the Board's order is prevented from taking effect. The fact that Eastern may, at some later time, have recourse to another administrative proceeding involving similar issues cannot compensate it for the revenue drain it will experience as a result of any action by the Court below that impairs the validity of the Board's order.

The posture of the instant case is not novel. Route awards and route adjustments by the CAB have been in the Courts of Appeals on review since the inception of the Board. Yet no case has been discovered where a competing carrier, having a direct and substantial interest in the preservation of a CAB decision in a route case, has been refused leave to intervene and protect that decision upon appeal. To the contrary, intervention under these circumstances has uniformly been allowed without discussion or dissent.[1] Ironically, within the past two years, Northeast

[1] *See, e.g., Delta Air Lines, Inc.* v. *CAB*, 275 F. 2d 632 (D. C. Cir. 1959), *cert. denied sub nom., Trans World Airlines, Inc.* v. *Delta Air Lines, Inc.*, 362 U. S. 969 (1960); *State Airlines Inc.* v. *CAB*, 174 F. 2d 510 (D. C. Cir. 1949), *rev'd on other grounds*, 338 U. S. 572 (1950); *American Airlines, Inc.* v. *CAB*, 178 F. 2d 903 (7th Cir. 1949).

There are a number of cases, virtually indistinguishable from the instant case, where intervention by the prevailing party was

has been allowed to intervene *without question* of its right to do so in two appellate proceedings where awards by the CAB beneficial to its interests were challenged. See *National Airlines, Inc.* v. *CAB*, 321 F. 2d 380 (D. C. Cir. 1963); *National Airlines, Inc.* v. *CAB*, 306 F. 2d 753 (D. C. Cir. 1962).

There is, in one specialized area, a line of cases which deny leave to intervene to one seeking intervention for the purpose of supporting an order of the NLRB. See, *e.g.*, *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (1st Cir.), *cert. denied sub nom., Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U. S. 863 (1959); *Haleston Drug Stores, Inc.* v. *NLRB*, 190 F. 2d 1022 (9th Cir. 1950), *cert. denied*, 342 U. S. 815 (1951). However, these cases are peculiar to NLRB practice and grow out of a statutory provision making the NLRB the sole agency for abating unfair labor practices. See 29 U. S. C. §160(a) (1958). In contradistinction to that provision in the National Labor Relations Act, the Federal Aviation Act provides, in pertinent part:

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allowed, with no issue as to the propriety of such action being raised. In *Southwest Airways Co.* v. *CAB*, 196 F. 2d 937 (9th Cir. 1952), the Board had denied Southwest's application for renewal of its temporary route between Los Angeles and Phoenix. When Southwest sought review of the order, Bonanza, which was awarded the route, was permitted to intervene in support of the Board's order. Similarly, in *Western Air Lines, Inc.* v. *CAB*, 196 F. 2d 933 (9th Cir.), *cert. denied*, 344 U. S. 875 (1952), the Board had denied certain applications of Western and had suspended certain portions of its route authority, and had certificated Bonanza to serve these routes instead of Western. When Western sought review, Bonanza was permitted to intervene in support of the Board's order. Likewise, in *United Air Lines Inc.* v. *CAB*, 198 F. 2d 100 (7th Cir. 1952), certain authority of United was suspended and transferred to Frontier. On United's appeal from that decision, Frontier was granted leave to intervene in support of the Board's order.

> "[I]n the case of a violation of section 401(a)[2] of this Act, any party in interest may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act . . . and such court shall have jurisdiction to enforce obedience thereto. . . ." (Footnote added.)

Federal Aviation Act §1007(a), 49 U. S. C. §1487(a) (1958). The rationale of the NLRB cases renders them inapposite in a circumstance where a statutory right to enforce an administrative order is specifically given to any party in interest. Thus, the labor cases have no applicability in the instant case.

Eastern respectfully submits that it fulfills the applicable requirements set forth by Rule 24(a) and held by the courts to be the governing consideration where parties to administrative proceedings seek to intervene on appeal of an administrative order. Having fulfilled those requirements, Eastern is entitled to intervene in the Court below as a matter of right.

Since the action of the Court below is in conflict with that of every other Court of Appeals wherein the question here under consideration has arisen (see footnote 1, *supra*), this Court should act to clarify the law and render its application uniform. Otherwise, the disparity in treatment of interested parties will lead to forum shopping. Orderly appellate practice in administrative law requires correction of the error of the Court below and the restoration of uniformity in the treatment of prospective interveners before reviewing courts.

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[2] Section 401(a) makes it unlawful for any person to engage in air transportation without a certificate of public convenience and necessity authorizing such transportation. See 49 U. S. C. §1371(a) (1958).

2.

The nature of this case is such that delay in giving effect to the determinations of the Civil Aeronautics Board as to public convenience and necessity will cost Eastern millions of dollars. Eastern urges therefore that this court not only direct the Court below to allow Eastern to participate in all proceedings before it but also that it invalidate the action taken by that court to stay and prolong the matter without Eastern's participation. The Court below, in granting a stay of the Civil Aeronautics Board's Order E-19910 until a date certain rather than for the pendency of judicial review alone, exceeded its jurisdiction and created uncertainty where previously the law had been clear. The governing statute,[3] Administrative Procedure Act §10(d), 5 U. S. C. §1009(d) (1958), states in pertinent part:

> "Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every

[3] The other statutory provision relating to the instant problem, Federal Aviation Act §1006(d), 49 U. S. C. §1486(d) (1958), is consistent with Section 10(d), although the language of the two provisions is not identical. Section 1006(d) provides, in pertinent part:

> "Upon good cause shown . . . , *interlocutory relief* may be granted by stay of the order or by such mandatory or other relief as may be appropriate." (Emphasis added.)

It should be noted that nothing but "interlocutory relief" is authorized by Section 1006(d). Black's Law Dictionary defines interlocutory as:

> "Something intervening between the commencement and the end of a suit . . ." Black, Law Dictionary 956 (4th ed. 1951).

Thus, §1006(d) of the Aviation Act and §10(d) of the Administrative Procedure Act authorize the same type of relief—one merely expresses the scope of the available remedy in a different manner. This being so, it does not really matter which provision is held to control.

> reviewing court . . . is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights *pending conclusion of the review proceedings.*" (Emphasis added.)

Senator McCarran, Chairman of the Senate Committee on the Judiciary at the time the Administrative Procedure Act was enacted, stated on March 12, 1946, during the discussion of the measure by the Senate that the purpose of the section was to enable the reviewing court to postpone the effective date of agency action or to preserve the status quo pending conclusion of review proceedings. S. Doc. No. 248, 79th Cong. 2d Sess. 323 (1946). Other statements to the same effect appear throughout the legislative history of the Act. See *id.* at 38-39, 213, 230, 277-78, 323, 369-70.

No court has held that Section 10(d) empowers a reviewing court to grant interim relief to a date certain. To the contrary, this Court has stated that the reviewing court has power to grant such relief pending judicial review.[4]

The order in the instant case stands as a clear holding that the grant of relief to a date certain, which might be later than the date of final disposition of the case (an expectable eventuality when the stay was granted since the Northeast appeal was to be argued before the First Circuit in January 1964) is within the jurisdiction of the reviewing court. The Order granted the stay "during the pendency of the petition for review herein in this Court . . . but because of the peculiar nature of this particular case, this stay shall be effective at least to and including

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[4] *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *Virginian Ry.* v. *United States*, 272 U. S. 658 (1926).

April 30, 1964." It was specifically urged below by the Civil Aeronautics Board that the grant of stay to a day certain was beyond the Court's power. See Memorandum of Civil Aeronautics Board in Opposition to Stay, 2-3 (Oct. 9, 1963). Until the issue is clarified by the Supreme Court, it will remain in dispute. The ever increasing volume of administrative agency litigation forecasts recurrence of the issue and the desirability of its resolution by this Court. If one court can, in effect, affirmatively license a carrier to engage in air transportation for a period of six months, another could do so for eight or ten, and another could license a television station for a year, or a pipeline for two years, *ad infinitum*.

3.

The decision of the Court below is further believed to be in error in that, upon the record presented, it could not reasonably have found that the criteria relevant to the grant of stay, enunciated by this Court in *Scripps-Howard Radio Inc.* v. *FCC*, 316 U. S. 4, 10, 11 (1942), and followed by every court of appeals wherein the issue has arisen, were satisfied. The courts of appeals have uniformly held that four prerequisites must be met by the moving party before a stay will issue:

"(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . .

(2) Has the petitioner shown that without such relief, it will be irreparably injured? . . .

(3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .

(4) Where lies the public interest?"

Virginia Petroleum Jobbers Ass'n v. *FPC*, 259 F. 2d 921, 925 (D. C. Cir. 1958).

Accord,

Airport Comm'n of Forsyth County v. *CAB*, 296 F.2d 95 (4th Cir. 1961);

Associated Sec. Corp. v. *SEC*, 283 F.2d 773 (10th Cir. 1960);

Eastern Air Lines, Inc. v. *CAB*, 261 F.2d 830 (2d Cir. 1958).

Northeast, below, at best, addressed itself only to numbers (1) and (2) above. In regard to the fundamental question of the likelihood of prevailing on the merits, the precedents cited by Northeast to show error on the part of the Board were not only distinguishable but irrelevant. Relevant precedent, on the other hand, indicates that a determination of the public interest, convenience and necessity so peculiarly vested in the Board's discretion will not be overturned on review.[5] In regard to the third requirement recited above

[5] See, *e.g.*, *Railroad Comm'n* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-82, 583, 584 (1940), where this Court stated:

> "Certainly in a domain of knowledge still shifting and growing and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. . . . Plainly these are not issues for our arbitrament. . . . It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

Thus, it seems highly unlikely that Northeast will prevail on the merits of its appeal, since there is ample warrant in the record for the Board's decision and the issues concerned are matters peculiarly committed to the Board's expert judgment. In these circumstances, the grant of a stay merely postpones the inevitable to the detriment of all concerned, Northeast and its employees included.

and not even alluded to by Northeast in its Motion for Stay, *i.e.*, harm to other parties, the other parties to the Board's proceeding, grievously harmed by the grant of stay,[6] were not even allowed to participate in the proceeding below.[7]

Northeast sought a stay from the CAB, urging upon the Board the same matters it urged upon the First Circuit. The Board denied Northeast's requests and, in so doing, passed upon questions of public and private interest which are within the Board's exceptional administrative competency. The First Circuit substituted its judgment for that of the Board and granted a stay upon the basis of allegations plainly without, and found by the Board to be without, merit. If a stay could properly be granted on the record before the Court below, then stay would issue as a matter of course in every proceeding in which review of a contested agency determination was sought. This result is directly contrary to this Court's statement, reiterated in numerous cases, that:

> "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant."

See *Scripps-Howard Radio, Inc.* v. *FCC*, *supra* at 10-11.

Where the threat of substantial property and financial damage is posed to the erstwhile successful litigant at the agency level by the prospect of a judicial stay, a reviewing court should, at least, receive oral argument and express its views in a written opinion that tests the varying con-

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[6] As shown by the record below, Eastern and National Airlines will lose approximately $72,685 per day throughout the period of the stay as a result of the Court's action, or a total of some $15 millions through April 30, 1964.

[7] The Court below denied all of Eastern's motions, including its motion for leave to file a memorandum in opposition to stay. Paradoxically, the Court's order granting stay recites that the Court "considered" all documents that had been filed.

tentions against the standards of established law. As the record shows, none of these steps was taken in this case.[8] This Court has recognized the problems inherent in procedures such as those employed by the Court below:

> "Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. . . . The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal; and the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor."
>
> *Virginian Ry.* v. *United States*, 272 U. S. 658, 675 (1926).

The absence of any opinion is particularly significant here where the order recited that "because of the peculiar nature of this particular case, this stay shall be effective at least to and including April 30, 1964." But the Court did not make any finding as to wherein the case is "peculiar" and did not even make any of the evidentiary material proffered by the would-be intervenors a part of the record. The motions praying leave to submit this material were denied out of hand.

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[8] If oral argument had been held, it would have been possible, for example, for Eastern to rebut irresponsible and erroneous allegations of union parties that were presented in memoranda and affidavits, to which Eastern had no opportunity to respond. Although the Court refused to allow intervention by those parties, and refused to permit their documents to be filed, nevertheless, the Court's order recites that they were considered. Of course it is not possible to ascertain the influence those contentions might have had on the decision, since the Court wrote no opinion. This illustrates, in part, why this Court has criticized refusals of lower courts to set forth in writing their reasons for granting stays. See, *e.g.*, *Virginian Ry.* v. *United States*, 272 U. S. 658 (1926).

4.

The errors committed by the Court below require correction now, and prior to final decision by the First Circuit. Denial of Eastern's intervention below deprives Eastern of substantial rights and protection of those rights require review by this Court now. The harm to Eastern which results from the improvidently granted stay will continue throughout the period during which the Board's order is held in abeyance. If this Court does not act now to review the action of the Court below in granting a stay until a date certain, the issue will be mooted by the lapse of time. Finally, the questions raised in the instant case are of paramount importance to the operations of all regulatory agencies under the Administrative Procedure Act. This Court need not be reminded of the volume of litigation pending before the federal regulatory agencies and in the federal courts seeking review of agency actions. The action of the Court below will impinge directly upon every litigant now involved in such proceedings. The public interest will be greatly served if this Court resolves the conflicts posed by the instant case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ E. Smythe Gambrell
/s/ Harold L. Russell
/s/ Robert Proctor
/s/ Richard Wait

Attorneys for Petitioner,
Eastern Air Lines, Inc.

Certificate of Service

I, Harold L. Russell, one of the attorneys for Eastern Air Lines, Inc. and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 31st day of December 1963, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit (and Appendices thereto) by mailing copies thereof, correctly addressed with first class postage prepaid to the following, as required by Supreme Court Rule 33:

Clarence I. Peterson, Esq.
Foley, Hoag & Eliot
10 Post Office Square
Boston 9, Massachusetts
Attorney for Northeast Airlines, Inc.

O. D. Ozment, Esq.
Associate General Counsel
Civil Aeronautics Board
Washington, D. C., 20428

Hon. Archibald Cox
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

/s HAROLD L. RUSSELL
HAROLD L. RUSSELL
Attorney for Eastern Air Lines, Inc.

December 31, 1963

APPENDIX A

ORDERS OF THE COURT BELOW, DATED OCTOBER 17, 1963

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6220.

NORTHEAST AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ORDER OF COURT

October 17, 1963

Upon consideration of motion of petitioner for stay pending review, memorandum in support thereof, answer of respondent thereto, and of all of the motions filed and the memoranda and affidavits proffered therewith as enumerated in a previous order this day [appearing at pp. 2-3 of this Appendix],

It is ordered that the taking effect of Order No. E-19910 of the Civil Aeronautics Board of August 15, 1963, be, and the same hereby is, stayed during the pendency of the petition for review herein in this Court including the time for filing any possible petition for rehearing and, if any such petition for rehearing be filed, the disposition thereof, plus one week, but, because of the peculiar nature of this particular case, this stay shall be effective at least to and including April 30, 1964.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk

cc: Messrs. Fordham and Wanner. [Courtesy cc: Messrs. Wait, Rooney and Hanify.]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6220.

NORTHEAST AIRLINES, INC.,

Petitioner.

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ORDER OF COURT
October 17, 1963

Upon consideration of (1) motion of Eastern Air Lines, Inc., for leave to intervene, (2) motion of Master Executive Council of Northeast Pilots for leave to intervene, (3) motion of Master Executive Council for leave to file memorandum and affidavit in support of motion of petitioner for stay, and the proffered memorandum and affidavit, (4) motion of International Association of Machinists for leave to intervene, (5) motion of International Association of Machinists for leave to file memorandum and affidavit in support of motion of petitioner for stay, and the proffered memorandum and affidavit, (6) motion of Eastern Air Lines, Inc., for leave to oppose motion of petitioner for stay, and the proffered memorandum and affidavit, (7) motion of National Airlines, Inc., for leave to intervene, (8) motion of National Airlines, Inc., for leave to file memorandum in opposition to the motion for stay and the proffered memo-

randum and affidavit, (9) petitioner's memorandum in opposition to the motions to intervene of Eastern Air Lines, Inc., and National Airlines, Inc., (10) motion of petitioner for leave to file reply to answer by respondent to motion for stay, and the proffered reply, (11) motion of National Airlines, Inc., for leave to file answer to petitioner's motion for leave to file a reply, and the proffered answer, and (12) motion of Eastern Air Lines, Inc., for leave to file memorandum in opposition to motion of petitioner for leave to file reply, and the proffered memorandum,

It is ordered that the aforesaid motions for leave to intervene generally be, at this stage, and the same hereby are, denied; and further

It is ordered that the remainder of the aforesaid motions be, and the same hereby are, denied.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk

[cc: Messrs. Fordham, Wanner, Wait, Rooney and Hanify.]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6220.

NORTHEAST AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ORDER OF COURT

November 6, 1963

Upon consideration of motions of National Airlines, Inc., and Eastern Air Lines, Inc., for reconsideration of the order of this Court of October 17, 1963, denying leave to intervene, and of memoranda in support thereof and in opposition thereto, and

Treating said motions as alternatively seeking leave to file briefs amici curiae,

Leave is hereby granted to said movants herein to file briefs amici curiae pursuant to Rule 23(19) of the Rules of this Court, and the motions are otherwise denied.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

[cc: Messrs. Fordham, Wanner, Rooney and Wait.]

APPENDIX B

STATUTES INVOLVED

Administrative Procedure Act §10, 5 U. S. C. §1009 (1958)

Section 10(d):

> INTERIM RELIEF—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Federal Aviation Act §1006, 49 U. S. C. §1486 (1958)

Section 1006(d):

> Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 720

IN THE MATTER OF THE PETITION OF EASTERN AIR LINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

No. 766

IN THE MATTER OF THE PETITION OF NATIONAL AIRLINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

1. In the government's view, petitioners Eastern Air Lines and National Airlines were entitled to intervene in the proceedings pending below—proceedings brought by Northeast Airlines for review of a Board order denying the application of Northeast for

719-322—64

renewed authority to operate south of New York to Miami and other points. As carriers operating between the same points and hence competitively affected, the petitioners were authorized to intervene in opposition to the Northeast renewal application before the Board (as they did); and unquestionably they would have had standing to obtain judicial review of any grant of the Northeast application.[1] If the court of appeals should set aside the Board's order, petitioners again would be entitled to participate in the further proceedings before the Board and to obtain judicial review of any Board action inimical to their competitive interests. Also, if the Board's order should be affirmed on review and if Northeast should continue to conduct operations in the absence of a certificate from the Board, petitioners would have standing (as would the Board) to obtain injunctive relief against such operations. Federal Aviation Act, Section 1007.[2]

In these circumstances, we think that petitioners have a sufficient interest in the review proceeding to

[1] Section 1006 of the Federal Aviation Act (72 Stat. 795, 49 U.S.C. 1486) confers standing to obtain review upon a person "disclosing a substantial interest in" the Board order involved. A competitor has a "substantial interest" which entitles it to intervene before the Board to obtain review of an adverse Board order. See, *e.g.*, *Seaboard & Western Airlines v. Civil Aeronautics Board*, 181 F. 2d 515; cf. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470.

[2] Section 1007 (72 Stat. 796, 49 U.S.C. 1487) authorizes a district court to enjoin violations of the Act on application of the Board or "in the case of a violation of Section 401(a) of this Act [the prohibition against operations without a certificate from the Board], any party in interest * * *."

intervene in defense of the Board's order. They will be bound by that judgment in the sense that they will have no recourse from such consequences as it may have upon their competitive interests. Although the Board is defending its order, petitioners correctly point out that a person entitled to intervene is also entitled to speak through his own counsel.[3] And while the court of appeals may well permit petitioners to participate, as *amici curiae,* to the same extent as they would as intervenors, that fact does not warrant a denial of intervention. Cf. *Federal Communications Comm'n* v. *N.B.C.,* 319 U.S. 239, 246. Thus, participation as *amici* would not authorize Eastern and National to seek this Court's review of a decision on the merits adverse to their contentions.

2. We also agree with petitioners' claim that the court of appeals lacks authority under either Section 1006(d) of the Federal Aviation Act or Section 10(d) of the Administrative Procedure Act to stay the effectiveness of the Board's denial of the Northeast renewal application beyond the conclusion of the proceedings for judicial review; it would seem that such a stay would constitute a judicial grant of a license denied by the Board. See *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 14; *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17.

[3] While petitioners suggest that the Board's order may not be fully defended because the Department of Justice was opposed to the Board's action, the fact is that the Attorney General has advised the Board to conduct, through its own legal staff, its defense of the merits of its order.

3. We suggest, however, that the Court may well conclude that neither of the issues noted above is of sufficient practical importance, in the present context of the case, to warrant consideration at this time, and that the petitions should accordingly be held in abeyance until it is ascertained whether the controversy will prove a live and significant one.

So far as the court of appeals' action in authorizing a stay to a day certain (April 30, 1964) is concerned, there appears to be no likelihood that this will permit Northeast to operate beyond the period of judicial review; the case will not be argued in the court of appeals before March. And since the court of appeals doubtless has power to issue a stay *pendente lite* (and, beyond that, pending the filing and disposition of a petition for certiorari in this Court), the matter is not one of any apparent moment.

As to the intervention issue, we perceive no prospect of irremediable injury if the Court refrains from considering that question at this time. Indeed, separate and plenary review of this issue now would seemingly make for delay rather than for expedition.

Respectfully submitted:

RALPH S. SPRITZER,
Acting Solicitor General.[*]

JOHN H. WANNER,
General Counsel,
Civil Aeronautics Board.

JANUARY 1964.

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[*] In lieu of the Solicitor General, who has disqualified himself for personal reasons.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 720

IN THE MATTER OF THE
PETITION OF EASTERN AIR LINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR NORTHEAST AIRLINES, INC., IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court below abused its discretion by limiting petitioner to participation as *amicus curiae* in proceedings to review an administrative order, where petitioner's only interest in the order is that it would

end the authority of Northeast Airlines to operate on routes also served by petitioner and another carrier, and where many of the forty participants in the administrative proceeding could present a far more compelling claim for intervention in the review proceedings.

2. Whether the court below abused its discretion in staying that order *pendente lite* and providing that the stay would be effective at least to a date certain (April 30, 1964) which will come well before the review proceedings can be concluded.

STATEMENT

By the narrow margin of 3 to 2, the Civil Aeronautics Board ("Board") on August 15, 1963, refused to make permanent the temporary authority it had granted in 1956 to Northeast Airlines, Inc. ("Northeast") to serve as a third carrier, along with Eastern Air Lines, Inc. ("Eastern") and National Airlines, Inc. ("National") in the heavily-traveled East Coast-Florida market. The Board thereupon issued its Order E-19910 terminating Northeast's authority to operate south of New York, effective on October 14, 1963. *New York-Florida Renewal Case*, C.A.B. Docket 12285 *et al.* The basis of the Board's decision was its conclusion that three carriers were not needed on the route—a complete reversal of the unanimous conclusion of the Board in 1956 that three carriers were needed (*New York-Florida Case*, 24 C.A.B. 94 (1956)) and of the conclusion of the trial examiner in the renewal proceedings that three carriers are still needed. In the words of the dissenters, the majority decision was "without precedent . . . not supported by the record and . . . contrary

to the statutory" mandate of competition in § 102 of the Federal Aviation Act. (49 U.S.C. § 1302).[1]

Northeast and others filed petitions for reconsideration or stay of Order E-19910, but on October 4, 1963, when only five business days remained before the date set by the Board for termination of Northeast's service south of New York, the Board still had not acted on those petitions. Therefore, Northeast filed a petition for review with the Court of Appeals for the First Circuit and applied for the stay necessary to permit Northeast to continue operating pending judicial review. As Northeast showed the court below, a stay was needed to prevent irreparable injury to Northeast, to preserve the jurisdiction of the Court of Appeals to correct the errors of the Board, and to protect the public interest. Northeast further pointed out that, because of the practical realities of Florida winter vacation travel, particularly the desire of vacationers to be certain of their return reservations, such a stay *pendente lite* had to include a date certain in order to be effective.[2]

On October 8, 1963, the Board, still divided 3-2, issued Order E-20073, denying the petitions for recon-

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[1] Board Order E-20073, Concurring and Dissenting Opinion, p. 2. The dissenters found that the need for a third carrier was supported not only by the record in the renewal proceedings, but also by "the Board's experience and decisions over the past twenty-five years." *Ibid.*

The United States also has taken the position that three carriers are required. Petition of the United States for Reconsideration and Reargument and for a Stay of the Decision and Order E-19910, p. 8.

[2] See Northeast's verified motion for a stay which is printed as Appendix A to Northeast's brief in opposition in No. 756 Misc.

sideration but postponing the effective date of Order E-19910 from October 14 to November 15, 1963. Contemporaneously, Eastern and National, two of the forty participants in the Board proceedings, both filed motions to intervene in the court below and also proffered voluminous oppositions to the application for a stay. Two organizations representing employees of Northeast—the Master Executive Council of Northeast Pilots and the International Association of Machinists, similarly participants before the Board—also sought to intervene and tendered papers in support of the stay application.

On October 17, 1963, the court below, after considering all papers submitted, including those filed and proffered by Eastern and National, entered orders (1) staying Order E-19910 pending the review proceedings and, "because of the peculiar nature of this particular case", at least to April 30, 1964, and (2) denying all four motions to intervene "at this stage". Pet. App. A, pp. 21-23.

In the three months following the October 17 orders of the court below, Eastern and National have launched against those orders an inconsistent series of harassing attacks. Those attacks have involved four distinct proceedings in three different federal courts. Inevitably, defending on so many fronts has diverted and wasted the resources of Northeast. And those diversionary attacks have tended to create an aura of confusion and uncertainty around the judicial review proceedings in the court below, the stay entered by that court, and the authority of Northeast to operate pursuant to that stay.

The series began on October 25, 1963, just eight days after the orders were entered, when both Eastern and

National filed in the court below motions for reconsideration of the order denying them leave to intervene (but not of the stay order). On November 6, 1963, the court below granted Eastern and National leave to participate as *amici curiae* and otherwise denied reconsideration of the order denying intervention. Pet. App. A, p. 24.

Eastern, without waiting for the court below to act on its motion for reconsideration, filed on November 5, 1963, its application to this Court for extraordinary writ of common law certiorari (No. 756 Misc.) seeking review only of the stay. Early in December, briefs in opposition to that application were filed by Northeast and by labor organizations representing its employees, and the Acting Solicitor General submitted a memorandum for the Board suggesting that the stay was "not of sufficient practical importance to warrant consideration here." On December 31, 1963, after all papers had been before this Court for almost a month—when action on the application was presumably imminent—Eastern moved to withdraw that application.

On the same day Eastern replaced that application with the present petition, which is no more than a carbon copy of that application with an argument as to intervention superimposed. National followed by filing on January 15, 1964, its petition, No. 766, which raises only the intervention issue.

Meanwhile, on December 11, 1963, National had instituted a collateral attack on the orders of the court below in the guise of an action in the Southern District of Florida under § 1007 of the Federal Aviation Act[3] to

[3] 49 U.S.C. § 1487, quoted in Appendix, *infra*.

enjoin Northeast's operations to and from Florida. *National Airlines, Inc.* v. *Northeast Airlines, Inc.*, No. 63-693-Civil. Northeast moved to dismiss the Florida litigation on various grounds, including lack of jurisdiction. Then, on Christmas Eve, Eastern joined as a plaintiff in that action. After hearings on December 27, 1963, and January 2, 1964, and numerous briefs, the court granted Northeast's motion to dismiss on January 10, 1964.

The contention of Eastern and National in the Southern District of Florida that Northeast's operations might be enjoined pursuant to § 1007 despite the pendency of the review proceedings and the stay issued by the court below was wholly inconsistent with their claims in this Court that they should be allowed to intervene because they are "bound" by the orders of the court below. Nevertheless, although Eastern entered the Florida litigation a full week before the present petition was filed, Eastern has never informed this Court of that litigation. Nor does National make any reference thereto in its petition, No. 766. Neither Eastern nor National can justify to this Court the inconsistent positions they have taken and may be continuing to take.[4]

The review proceedings below are to be argued on the merits in March, and Northeast has filed its brief therein. It is imperative to Northeast that the merits be decided as quickly as possible. Northeast's routes south of New York account for approximately 80 per-

[4] Neither Eastern nor National has indicated whether it intends to appeal to the Fifth Circuit from the order dismissing the Florida litigation.

cent of Northeast's present business volume, and so long as their status is uncertain and involved in litigation, it is difficult for Northeast to maintain the public acceptance that it has achieved in the East Coast-Florida market over the years since 1956, and it is impossible for Northeast to make future business plans.[3] Northeast accordingly wishes to avoid delay in the determination of the merits below.

ARGUMENT

The tactics employed by Eastern speak for themselves—the failure to raise the intervention point in No. 756 Misc.; the eleventh hour withdrawal of that petition and its replacement by the present No. 720, which repeats the arguments for review of the stay and belatedly asks for review of the denial of intervention; the presentation of inconsistent arguments to the Florida district court and to this Court; and the failure to inform this Court of the Florida litigation. These tactics color, we submit, Eastern's entire presentation and point up the obvious weakness of its petition—the lack of any real substance in the issues it asks this Court to hear.

Thus, Eastern, although it has not been permitted to intervene below, was fully heard on the question of stay and, as an *amicus curiae*, has full opportunity to submit to the court below any relevant contentions on the merits. Similarly, it is clear that the judicial review proceedings will still be pending on the date certain specified in the stay (April 30, 1964). In short,

[3] Cf. Northeast's verified motion for a stay which is printed as Appendix A to its brief in opposition in No. 756 Misc.

Eastern is crying over hypothetical spilled milk: The questions raised are abstract as well as insubstantial; they are of no practical significance to the judicial review proceedings and Eastern has not really been hurt.[6]

As the Board suggests, neither of the issues presented by the Eastern and National petitions "is of sufficient practical importance, in the present context of the case, to warrant consideration at this time . . . ." Memorandum for the Board, p. 4. Moreover, both the stay and intervention issues are matters which, in the context of judicial review of Board orders, are committed to the discretion of the court below in the light of the particular facts of this case. Here the court below certainly cannot be charged with abuse of that discretion and even if it could, such a charge would present no question of general importance warranting review.

I. *The Intervention Issue.* The orders denying Eastern leave to intervene "at this stage" do not warrant the attention of this Court. As will be developed, they rested in the sound discretion of the court below.

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[6] Eastern's petition itself discloses the anomaly of its position. On the one hand, it complains that the stay ordered by the First Circuit and the extension granted by that court for the filing of briefs are daily causing Eastern financial injury. Yet it seeks to interrupt and thereby delay the First Circuit's review—a form of statutory review tailored to "abbreviate the process of judicial review", see *Foti* v. *Immigration & Naturalization Service*, 84 Sup. Ct. 306 (1963)—by asking this Court to consider interlocutory orders prior to determination of the merits in that review.

The Memorandum for the Board points out that plenary review of the intervention issue "now would seemingly make for delay rather than for expedition" (p. 4). That is a consequence which Northeast is most anxious to avoid because of its need for prompt decision on the merits.

there being no statute or rule providing for a "right" to intervene in this case. Eastern fails to show any abuse of that discretion, particularly since it has been given leave to participate as *amicus*. Review is further inappropriate because Eastern's petition is premature.

1. Simply stated, Eastern claims that its participation as an intervenor before the Board in the proceedings involving Northeast's renewal application for certificate authority gives it the right to intervene in judicial review of that order. Yet it has been held repeatedly that no right to judicial review accrues as the result of intervention before the agency. *E.g., Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479 (1930); *Moffat Tunnel League* v. *United States*, 289 U.S. 113 (1933).[7] The Federal Aviation Act does not confer any right to intervene in judicial review of Board orders conducted pursuant to § 1006 of the Act.

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[7] In a similar situation involving review of an administrative order under a statute which, like the Federal Aviation Act, does not provide for intervention, it was held that:

> "[N]othing in the Act makes it mandatory upon a court of appeals, on review of a Commission order, to allow applications for leave to intervene, merely because the applicant had been admitted as a party to the administrative proceeding below." *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 201 F. 2d 334, 342 (1st Cir. 1953).

Similarly, the Board's Rules of Practice in Economic Proceedings specifically provide that grant of leave to intervene before the Board shall not "be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order . . . as will entitle it to judicial review of such order." 14 C.F.R. § 302.15(d).

49 U.S.C. § 1486.[8] Nor does the Administrative Procedure Act speak on this subject. In short, the "right" which Eastern claims to have been denied is not granted by statute and has not been recognized by the courts. In the absence of some provision for intervention, when a Court of Appeals is presented with a motion to intervene in a judicial review of an administrative order, the "matter lies within . . . [its] discretion." *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 201 F.2d 324, 342 (1st Cir. 1953); 1 Davis, *Administrative Law*, § 8.11, pp. 571-572.

In an effort to distort the First Circuit's discretionary choice into an appealable denial of a right, Eastern purports to find a *right* to intervene in the Court of Appeals' proceeding in Rule 24(a)(2) of the "Federal Rules of Civil Procedure *for the United States District Courts.*" (Emphasis added.) Eastern's contention is belied by the very title of those Rules, and by Rule 1 which specifies that those Rules govern "the procedure in the United States *district* courts." (Emphasis added.) In exercising their discretion, Courts of Appeals may advert to the Rules for appropriate analogy, see *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, *supra*, at 342, but the Rules themselves do not purport to govern, and have not

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[8] In fact, insofar as the Act concerns itself with judicial intervention, it shows an intent to make intervention discretionary and not a matter of right. Section 1007 of the Act, 49 U.S.C. § 1487, gives private parties in interest the right to bring suits to enjoin violations of competing carriers' certificate authority. But where the Board institutes such actions, Section 1009, 49 U.S.C. § 1489, merely makes it "lawful" for a court "to permit the intervention" of interested and affected parties. See Appendix, *infra*, for the text of §§ 1006, 1007 and 1009.

been construed as governing procedure in the Courts of Appeals. Significantly, with one exception, Eastern's petition relies wholly on cases concerning intervention before District Courts to support its contention that Rule 24(a)(2) creates a "'right" of intervention in the present case. The exception is the *Algonquin* case, *supra*, which explicitly held that intervention in Court of Appeals is a matter for that court's discretion. 201 F.2d at 342.

2. Even if Eastern is given the benefit of its fallacious argument that Rule 24(a)(2) governs here, the situation at hand would not give Eastern a right to intervene. The Rule demands that two conditions be satisfied: that Eastern "is or may be bound by a judgment" entered by the First Circuit, and that representation of Eastern's interests by existing parties to the appeal "is or may be inadequate." Neither condition is satisfied in this case.

a. Eastern can be "bound" within the meaning of Rule 24(a)(2) only if some legally cognizable right or interest of Eastern is involved in the proceeding in the court below. The proceeding below—unlike the cases Eastern relies on as precedent[9]—in no way involves Eastern's right to operate. The order under review did not grant Eastern certificate authority; nor did the order deny Eastern authority or modify its existing

[9] It should be noted that *all* the cases Eastern cites in its footnote 1 (Pet. 10), in support of its statement that "a competing carrier", with a "direct and substantial interest in the preservation of a CAB decision in a route case" has a right to intervene, are cases where the intervening carrier was granted authority to fly by the Board order it sought to protect. In none of those cases was intervention allowed to a carrier whose sole interest was to rid itself of competition.

certificate. Eastern's sole interest in the order is that it would eliminate a competitor. As a matter of law, any economic damage to Eastern which may result from a renewal of Northeast's certificate would not constitute a modification or dilution of Eastern's certificate rights. *Delta Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 275 F.2d 632, 641 (D.C. Cir. 1959), *cert. denied sub nom., Trans World Airlines, Inc.* v. *Delta Air Lines, Inc.*, 362 U.S. 969 (1960).[10]

Faced with this lack of a legally cognizable interest, Eastern is reduced to making the following contention as to why it is "bound"—so long as the Board order is stayed, and thereafter if the order be set aside, Eastern cannot obtain injunctive relief under § 1007 of the Federal Aviation Act, 49 U.S.C. § 1487, on the ground that Northeast is flying to Florida without certificate authority.[11]

But the fact that § 1007 of the Act gives Eastern the right of a "private attorney general" to sue to enjoin violations of certificate authority by a competitor in no way implies that Eastern has a "right" to participate in all proceedings to determine the scope of such authority. The right of a competitor to enjoin flights

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[10] For the sake of realism, it should be noted that the vast amounts which Eastern claims it is losing are actually the hypothetical additional profits which Eastern hopes to make as a result of elimination of the competition of Northeast—certainly chickens which have not hatched.

[11] Eastern contradicted its present position in its abortive appearance before the Florida district court, where Eastern argued that in its § 1007 action it was not "bound" by the review proceedings and stay issued below—the precise opposite of the argument Eastern now sets forth before this Court. See p. 6, *supra*.

in violation of Board orders by necessity must await final determination of the validity of those orders; clearly there can be no right to enforce an erroneous Board order. In other words, Eastern would have the right under § 1007 to enjoin Northeast from flying in violation of its certificate as finally determined, but whether Northeast is flying in violation of its certificate is not in issue before the First Circuit. The only issue that was before the Board, and the only issue currently under review by the First Circuit, is the purely public issue of whether the renewal of Northeast's authority is in accordance with the "*public* convenience and necessity."[12]

b. Nor does Eastern meet the other requirement of Rule 24(a)(2)—that "the representation of the applicant's interest by existing parties is or may be inadequate."[13] Eastern bases its claim of inadequate representation on the premise that the Department of Justice may prevent the Board from appearing as party respondent to defend its order. That premise is not only absurd—it is refuted by the Board's Memo-

[12] Analogous attempts of would-be intervenors to gain access to pending litigation have been denied by this Court on the ground that the applicants would not be "bound". In the recent case of *Sam Fox Publ. Co. v. United States*, 366 U.S. 683 (1961), this Court separated the private interest of Sam Fox from the purely public interest being vindicated by the United States through an antitrust consent decree. Even though Sam Fox was one of the class whose competitive interests the decree was designed to protect, this Court concluded that Sam Fox had no stake in, and was not bound by, the adjudication of that public interest. A like conclusion must obtain here. See also *Sutphin Estates, Inc. v. United States*, 342 U.S. 19 (1951).

[13] As shown above, Eastern has no legally cognizable "interest" in this appeal, any more than do some forty other parties to the Board proceeding which led to the order under review.

randum (see note 3, p. 3 thereof). And, if the Board should at any time default, Eastern can then seek intervention at that time. See *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944); *Pellegrino* v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953).[11]

Moreover, Eastern's allegation that its interests may be inadequately represented seemingly fails to take account of its right, granted by the First Circuit, to participate in the appeal as an *amicus curiae*. This gives Eastern the opportunity to present its views fully to the court below.

3. The above discussion disposes of Eastern's claim that it is entitled to intervene in the statutory review proceeding below as a matter of right. The matter was one for the exercise of the First Circuit's discretion and, unless it abused that discretion, its order denying intervention is not appealable to this Court. *Brotherhood of Railway Trainmen* v. *Baltimore & O. R. Co.*, 331 U.S. 519, 524-525 (1947).

The First Circuit, in denying Eastern leave to intervene, was applying accepted standards of discretion laid down in similar cases which have concluded that the agency which promulgated the order under review "can take care of itself," and that additional argument of private parties who seek to defend the agency's order "would be repetitious and cumulative." *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, *supra*, at 342. Parties who are in agreement with the order being reviewed and who seek to join with the agency on appeal simply are not aggrieved by such order. *Amalgamated Meat Cutters* v. *National Labor*

[11] This consideration points up the premature nature of the present petition. See p. 16, *infra*.

Rel. Bd., 267 F.2d 169 (1st Cir.), *cert. denied sub nom., Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U.S. 863 (1959), and may adequately express their views to the court by appearing as *amici curiae*. *Haleston Drug Stores, Inc.* v. *National Labor Rel. Bd.*, 190 F.2d 1022 (9th Cir. 1950), *cert. denied*, 342 U.S. 815 (1951).

Proceedings before the Board frequently involve numerous parties who are granted leave to appear in order to make their interests known and placed in the record. In the Northeast renewal proceeding, about forty such parties appeared—chambers of commerce, unions, municipalities, airlines, etc. It surely lies within the discretion of the reviewing court to decide that the appeal will be muddied rather than clarified by allowing these interests to participate as parties. Eastern, which hopes to benefit economically from the Board's order, certainly presents a less compelling claim for intervention than those participants before the Board who will be injured by that order, such as the two unions whose motions to intervene were also denied by the same October 17 order of which Eastern complains.

In the light of these circumstances the court below did not abuse its discretion in limiting Eastern to the filing of a brief *amicus*. In any event, the appropriateness of the exercise of such discretion hardly warrant the attention of this Court.[15]

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[15] The fact that other courts in other circumstances have allowed intervention in proceedings reviewing Board orders (see Pet. 10, note 1) does not give any basis for concluding that the court below abused its discretion in this case, nor does it mean that there is any conflict. As Eastern concedes, the question of whether intervention was proper was not raised or considered in those cases. In addition, the cases are patently distinguishable. See note 9, *supra*.

4. Finally, Eastern's request for review of the denial of intervention is premature. The court below has not ruled that Eastern may never intervene, regardless of the circumstances—it has simply said that Eastern may not intervene "at this stage", *i.e.*, at the outset of the review. Such disposition is entirely sensible.

If the order of the Board is affirmed by the court below, Eastern will have no cause to complain, and review of the intervention issue now "would have been an idle gesture." *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944). On the other hand, if the Board's order is set aside, the Board may petition for review in this Court, and Eastern again will have no cause to complain. Meanwhile there is no need to speculate. If the concerns Eastern expresses should somehow become realities to its prejudice, it will be time enough for Eastern to seek relief by a new application for intervention in the court below. *Cf.*, *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944); *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953).[16]

II. *The Stay Issue.* On the stay issue, Eastern's present petition simply repeats almost verbatim the points it urged in No. 756 Misc. The reasons why those points do not warrant the attention of this Court were

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[16] Any claim of abuse of discretion in denying Eastern leave to intervene can only be determined "in the light of the whole record" on appeal, for such claim should not be considered if "examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented." *Allen Calculators, Inc.* v. *National Cash Register Co.*, *supra*. Eastern's allegations are "too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion" prior to the determination of the merits below. *Saltpeter Estates, Inc.* v. *United States*, 342 U.S. 19, 23 (1951).

fully developed in the responses filed in that docket by Northeast, its employees, and the Board, and need not be discussed at length again. We respectfully refer the Court to those responses and simply state in summary:

1. Eastern's claim that the court below erred in granting the stay at least to April 30, 1964, rather than *pendente lite* alone, presents an abstract question which there is no practical reason or need for this Court to review. As the Board advised this Court in No. 756 Misc. and states again in its Memorandum in the present No. 720, the case will not be argued before March, and "there appears to be no likelihood" that the inclusion of the April 30 date "will permit Northeast to operate beyond the period of judicial review". The case will thus still be *pendente lite* on April 30 and the inclusion of that date in the stay accordingly has no legal significance.

2. In its other contention concerning the stay—that the court below erred in issuing any stay at all—Eastern is simply asking this Court to review the manner in which discretion was exercised below. Plainly that contention presents no substantial question warranting review.

CONCLUSION

There is thus no basis for Eastern's sweeping and unsupported statements that issues of "paramount importance to the operations of all regulatory agencies" and "conflicts" are posed by this case. Pet. 19. The court below, in the exercise of the discretion and power conferred upon it, acted discretely on the particular factual situation before it in granting the stay and in limiting Eastern to participation as *amicus*. In

issuing those interlocutory orders, the court applied accepted standards and did not lay down any new or important principles of general application. Accordingly, for the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1, 1964

APPENDIX

Relevant Provisions of the Federal Aviation Act of 1958 (72 Stat. 737 et seq., as amended; 75 Stat. 497)

Section 1006 (49 U.S.C.A. § 1486):

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or

Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification of certiorari as provided in section 1254 of Title 28.

Section 1007 (49 U.S.C.A. § 1487):

(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

(b) Upon the request of the Board or Administrator, any district attorney of the United States to whom the Board or Administrator may apply is authorized to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this chapter or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of

such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

Section 1009 (49 U.S.C.A. § 1489):

In any proceeding for the enforcement of the provisions of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, whether such proceedings be instituted before the Board or be begun originally in any court of the United States, it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration; and inquiries, investigations, orders, and decrees may be made with reference to all such parties in the same manner, to the same extent, and subject to the same provisions of law as they may be made with respect to the persons primarily concerned.